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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON PLAZOLA BARTOLENO,

Defendant and Appellant.

D047996

(Super. Ct. No. SCE247632)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed as modified.

Ramon Plazola Bartoleno appeals a judgment following his jury conviction of multiple counts of forcible rape and other offenses, including robbery. On appeal, he contends the trial court erred by: (1) not instructing with CALJIC No. 10.65 on the mistake-of-fact defense to charges of forcible rape, sodomy, and oral copulation; and (2) sentencing him to a consecutive full 10-year Penal Code section 12022.53¹ enhancement

¹ All statutory references are to the Penal Code unless otherwise specified.

in addition to the consecutive one-year term imposed for his subordinate robbery conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On February 6, 2005, J.G. was living with her ex-boyfriend and a friend in an El Cajon apartment. They hosted a Super Bowl party that day. After the game, J.G. walked with a guest to the parking lot to say goodbye. On her return, she found Orvis in his room with two others engaged in three-way sex. She was shocked and upset. After sitting in the living room for 10 to 15 minutes, she decided to go for a walk. Wearing baggy pajamas, an oversized t-shirt, a big sweatshirt, flip-flops, and a Lakers' cap, J.G. walked 20 to 25 minutes to a convenience store to buy cigarettes.

Shortly before 10:00 p.m., as J.G. was walking home, Bartoleno drove up and offered her a ride home. Because she was in a weird mood and was upset, she accepted the ride. She told him where she lived and explained why she was upset. As they approached her apartment, Bartoleno stopped and, rather than letting her out, he grabbed her wrist and told her she was going for a ride with him. She reached for the door and tried to free herself, but was unsuccessful. Using his other hand, Bartoleno pulled a black handgun from his jacket and pointed it at her. J.G. began to cry. Bartoleno drove around for about 30 to 45 minutes before parking his car at a closed daycare facility.

After parking, Bartoleno apologized and told J.G. he had never done anything like this before. When he tried to kiss her, she started crying and struggled to get out of the car. She opened the door and got one foot out, but he pulled her back in the car. As she cried, he reached under the driver's seat where he had placed the gun and asked, "Do you

want me to shut you up?" Because she was afraid he would shoot her, she cried as quietly as she could. He lifted up her shirt and kissed her breasts and neck. He pulled off her pants, licked her vagina, and then placed his penis in her vagina and later her anus. She cried the whole time. He stopped, pulled up his pants, and said something like, "I can't even have sex with you."

J.G. asked if she could leave and began to get out of the car without her pants or purse. Bartoleno told her to get dressed and he would take her home. She said she would rather walk. As she got dressed, he looked through her purse. He asked her if she had any money or credit cards. He took \$5 from her purse and took her watch off her arm. She got out of the car and walked about 10 minutes until she found a telephone.

At about 10:48 p.m., J.G. called 911 from a bar, reporting she had been raped and robbed at gunpoint. Officer Kai Mandelleh responded to her call. On his arrival, she was crying and seemed to be in shock.

Officer Michael Doyle heard the radio dispatch describing the suspect. He saw Bartoleno, who matched the suspect's description, less than one mile from the bar at which J.G. had placed her 911 call. Bartoleno was wearing a backpack and removing a bicycle from the trunk of his car. He seemed nervous and gave Doyle conflicting stories about what he was doing. Bartoleno denied having driven the car, but when Doyle noted the car's hood was warm, Bartoleno changed his story and said he was going to get gas. He spontaneously told Doyle he could search his car, but not him or his backpack. Suddenly, Bartoleno yelled, "My kids, my kids!" and began running away. When Doyle chased him, drew his gun, and ordered him to stop, Bartoleno dropped his backpack, but

continued running. He finally stopped when Doyle pointed the red beam of his tazer on Bartoleno's chest.

Bartoleno's backpack contained a fully loaded gun stolen four days earlier during a residential burglary.² J.G.'s watchband was found in Bartoleno's pocket and her watch's face was found in the front seat of his car. At a curbside lineup, J.G. identified Bartoleno as her attacker. Thereafter, a sexual assault nurse examined J.G. and concluded the lacerations, pinpoint hemorrhages, and other injuries found in her vaginal and anal areas were consistent with J.G.'s description of the incident. Bartoleno later stipulated that the sperm found on J.G.'s vaginal wall matched his DNA.

An information charged Bartoleno with one count of kidnapping for rape (§ 209, subd. (b)(1)), two counts of forcible rape (§ 261, subd. (a)(2)), one count of forcible sodomy (§ 286, subd. (c)(2)), one count of forcible oral copulation (§ 288a, subd. (c)(2)), one count of robbery (§ 211), one count of possession of a stolen, concealed firearm in a vehicle (§ 12025, subds. (a)(1), (b)(2)), and one count of receipt of stolen property (§ 496, subd. (a)). As to the first six counts, the information alleged Bartoleno personally used a firearm in committing those offenses (§§ 12022.53, subd. (b), 1203.06, subd. (a)(1)). As to the second through fifth counts, the information alleged he kidnapped the victim to commit those offenses (§ 667.61, subds. (a), (c), (d)(2), & (e)).

At trial, the prosecution presented the testimonies of J.G., Mandelleh, Doyle, the nurse, and other witnesses who testified substantially as described above. In his defense,

² Other items taken during that burglary were found in Bartoleno's home.

Bartoleno presented the testimony of Harry Bonnell, a forensic medicine expert, who stated that J.G.'s injuries could have been caused during consensual sex. Bartoleno also presented the testimony of his wife, Veronica Ponce, who stated that she and Bartoleno had allowed a homeless man to use their home to shower and take care of some business. When that man left his backpack at their home, she looked inside it and saw a handgun similar to the one police found in Bartoleno's backpack at the time of his arrest. Bartoleno told her he was going to find the homeless man who had asked him to take care of his backpack. Bartoleno did not testify in his defense.

The jury found Bartoleno guilty on all counts and found true all allegations. The trial court sentenced Bartoleno to an indeterminate term of 25 years to life with an additional 10-year enhancement for count 2 (forcible rape with personal use of a firearm) and an aggregate determinate term of 51 years, 8 months for counts 3 through 8.³

Bartoleno timely filed a notice of appeal.

DISCUSSION

I

CALJIC No. 10.65

Bartoleno contends the trial court erred by denying his request to instruct with CALJIC No. 10.65 on the mistake-of-fact defense to the charges of forcible rape, sodomy, and oral copulation. He argues there was substantial evidence to support an

³ Pursuant to section 654, the court apparently stayed imposition of a sentence for count 1.

instruction on that defense of reasonable and good faith, albeit mistaken, belief of a defendant that the other person consented to the acts.

A

For criminal liability, section 20 requires the concurrence of a criminal act with an accompanying criminal intent.⁴ For forcible rape, sodomy, or oral copulation, the requisite intent is the general criminal intent to perform the act that is a crime. (CALJIC No. 3.30.) In general, the criminal act in those offenses is the commission of that sexual act against the other person's will (i.e., without his or her consent) by means of force, violence, menace, or fear of immediate and unlawful bodily injury to that person. (CALJIC Nos. 10.00, 10.10, 10.20.)

However, if the defendant had a reasonable and good faith, albeit mistaken, belief that the other person consented to the sexual act, the defendant lacks the requisite criminal intent for a forcible rape, sodomy, or oral copulation offense. In *People v. Mayberry* (1975) 15 Cal.3d 143, the court stated:

"If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of . . . rape by means of force or threat [citation.]" (*Id.* at p. 155.)

In *Mayberry*, the defendant testified the alleged victim had consented to sexual intercourse with him. (*Id.* at p. 149.) In the circumstances of that case, the court

⁴ Section 20 provides: "In every crime . . . there must exist a union, or joint operation of act and intent, or criminal negligence."

concluded the trial court erred by denying the defendant's request for an instruction on that defense of mistake of fact regarding the alleged victim's consent to the act. (*Id.* at pp. 153-158.)

In *People v. Williams* (1992) 4 Cal.4th 354 (*Williams*), the court revisited the *Mayberry* defense. In *Williams*, as in *Mayberry*, the defendant testified the alleged victim consented to the sexual act. (*Williams*, at pp. 358-359.) Although the trial court instructed on actual consent, it denied the defendant's request for an instruction with CALJIC No. 10.65 on the defense of reasonable and good faith belief as to consent. (*Williams*, at p. 359.) On appeal, *Williams* described the "*Mayberry* defense" as consisting of "two components, one subjective, and one objective." (*Id.* at p. 360.) *Williams* explained:

"The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent.

"In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. [Citations.]" (*Id.* at pp. 360-361, fn. omitted.)

A trial court must give a requested *Mayberry* instruction "only when the defense is supported by 'substantial evidence,' that is, evidence sufficient to 'deserve consideration by the jury,' not 'whether *any* evidence is presented, no matter how weak.'" (*Williams*,

supra, 4 Cal.4th at p. 361.) Accordingly, "in determining whether the *Mayberry* instruction should be given, the trial court must examine *whether there is substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse.*" (*Id.* at p. 361, italics added.) Furthermore, a *Mayberry* instruction "should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Williams*, at p. 362.) In the circumstances of *Williams*, the court concluded that, based on the "wholly divergent accounts" of the alleged victim and the defendant, there was "no middle ground from which [the defendant] could argue he reasonably misinterpreted [the alleged victim's] conduct." (*Ibid.*) Accordingly, *Williams* concluded "[t]here was no substantial evidence of equivocal conduct warranting an instruction as to reasonable and good faith, but mistaken, belief of consent to intercourse." (*Ibid.*) In particular, the court rejected the notion that the alleged victim's consent to spend time with the defendant could constitute equivocal conduct regarding the specific act of intercourse. (*Id.* at p. 363.) Accordingly, the court held the trial court did not err by refusing to instruct with CALJIC No. 10.65. (*Williams*, at pp. 363-365.)

As guidance to courts in future cases, *Williams* noted:

"[T]here may be cases, as in *Mayberry*, in which there is evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, but also evidence that this equivocal conduct occurred only after the defendant's exercise or threat of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' [Citations.] No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior *after* the defendant had

exercised or threatened 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' [Citations.] However, a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others. Since a trial judge cannot predict which evidence the jury will find credible, he or she must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred. The jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' " (*Williams, supra*, 4 Cal.4th at p. 364.)

B

In this case, Bartoleno requested an instruction on the *Mayberry* defense with CALJIC No. 10.65, as follows:

"In the crime of unlawful [forcible rape] [oral copulation by force and threats] [forcible sodomy] [penetration of the [genital] [or] [anal] opening by a foreign object, substance, instrument or device by force, [violence] [fear] [or] [threats to retaliate]], criminal intent must exist at the time of the commission of the (crime charged).

"There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] [oral copulation] [sodomy] [or] [penetration of the [genital] [anal] opening by a foreign object, substance, instrument, or device]. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge[.] [, unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity.]

"[However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim or another is not a reasonable good faith belief.]

"If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find [him] [her] not guilty of the crime."

The trial court denied Bartoleno's request for an instruction with CALJIC No. 10.65, noting it had read *Williams* and did not think there was substantial evidence of equivocal conduct by J.G. that would have led Bartoleno to reasonably and in good faith believe she had consented, when she had not.

C

Because there was insufficient evidence in the record to support an instruction with CALJIC No. 10.65, we conclude the trial court properly denied Bartoleno's request for that instruction on the *Mayberry* defense. In support of his argument that there was substantial evidence to support a *Mayberry* defense instruction, Bartoleno argues J.G. testified she accepted a ride from him and complained to him about her ex-boyfriend's three-way sex.⁵ However, that testimony does *not* constitute substantial evidence of equivocal conduct that would have led Bartoleno to reasonably and in good faith, albeit mistakenly, believe she consented to the specific acts of intercourse, sodomy, and oral

⁵ Bartoleno's brief argues: "Here, [J.G.] testified that she was in a weird mood and was so shocked, frustrated and upset at her ex-boyfriend and her roommate for openly engaging in a three-way sexual encounter in their apartment, and then asking her to join them, that she did something she had never done before: she accepted a ride from a stranger. [Citations.] Once in the car, she and appellant smoked cigarettes together, and she was ranting to him about how upset she was about having walked in on the three-way. [Citation.] . . . [¶] These facts amount to substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent."

copulation between J.G. and Bartoleno. (*Williams, supra*, 4 Cal.4th at p. 362.) Like in *Williams*, J.G.'s agreement to accept a ride with, and presumably spend a short period of time with, Bartoleno did not constitute equivocal conduct regarding the specific acts of intercourse, sodomy, and oral copulation. (*Id.* at p. 363.) To conclude otherwise would " 'revive the obsolete and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place.' " (*Ibid.*) Furthermore, although Bartoleno argues J.G.'s credibility was impeached by laboratory tests showing (contrary to her denial) that she had consumed cocaine prior to the incident, impeachment of her credibility does not, by itself, constitute substantial evidence supporting a *Mayberry* defense instruction.

We further note Bartoleno's use of physical force against, and threatened harm by pointing a gun toward, J.G. detracts from any possible argument that he reasonably and in good faith, albeit mistakenly, believed she consented to the sexual acts he *subsequently* performed on her. (*Williams, supra*, 4 Cal.4th at p. 364.) Finally, we note the circumstances in this case appear to provide even less support for a *Mayberry* instruction than the circumstances in *Williams*. Unlike *Williams*, in this case the defendant did not testify. (*Id.* at p. 359.) Therefore, while in *Williams* there were two "wholly divergent accounts" that created no middle ground for a *Mayberry* defense, in this case there was only one uncontradicted account (i.e., J.G.'s account) that created *no ground* for a

Mayberry defense.⁶ (*Williams, supra*, 4 Cal.4th at p. 362.) Accordingly, lacking substantial evidence in the record in this case to support an instruction with CALJIC No. 10.65 on the *Mayberry* defense of reasonable and good faith belief as to consent, the trial court properly denied Bartoleno's request for that instruction. (*Williams*, at p. 363.)

II

Robbery Enhancement

Bartoleno contends the trial court erred by imposing a consecutive full 10-year section 12022.53, subdivision (b) enhancement in addition to the consecutive one-year term (one-third of the middle term) imposed for his subordinate robbery conviction. He argues only one-third of the 10-year enhancement should have been imposed. The People agree with Bartoleno's contention.

A

In sentencing Bartoleno, the trial court selected the count 2 (forcible rape) term as the principal term, imposing an indeterminate term of 25 years to life with a consecutive 10-year term for the related section 12022.53, subdivision (b) enhancement. On count 6 (robbery), the court imposed a consecutive term of one year (one-third of the middle term), and added a consecutive *full* 10-year term for the related section 12022.53, subdivision (b) enhancement.

⁶ Bartoleno's reference in his reply brief to the testimony of Bonnell, the forensic medicine expert, regarding the possibility J.G.'s injuries may have been caused during consensual sex, supports only Bartoleno's defense theory of actual consent. It does *not* support a defense argument that although she did *not*, in fact, consent, Bartoleno reasonably and in good faith believed she did.

B

Section 1170.1, subdivision (a) provides in part: "[W]hen any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed . . . , the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements *The subordinate term* for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.*" (Italics added.)

In *People v. Moody* (2002) 96 Cal.App.4th 987, the court concluded the trial court erred by imposing a consecutive *full* 10-year section 12022.53, subdivision (b) enhancement in addition to the consecutive term imposed for the defendant's subordinate attempted robbery conviction. (*Moody*, at pp. 989, 994.) Applying section 1170.1, subdivision (a)'s provision regarding enhancements to subordinate offenses, *Moody* modified the judgment to impose a section 12022.53, subdivision (b) enhancement of only one-third of the 10-year term, or three years four months. (*Moody*, at p. 994.)

We, like the court in *Moody*, conclude section 1170.1, subdivision (a) requires a section 12022.53, subdivision (b) enhancement to a consecutive subordinate term be reduced from its full term to one-third of that term. (*People v. Moody, supra*, 96 Cal.App.4th at pp. 990-994.) Accordingly, the trial court erred in this case by imposing a consecutive full 10-year term for the section 12022.53, subdivision (b) enhancement on

Bartoleno's subordinate robbery conviction. That enhancement must be reduced to one-third of its full 10-year term, or three years four months.

DISPOSITION

The judgment is modified to reflect imposition of a consecutive term of three years four months for the Penal Code section 12022.53, subdivision (b) enhancement related to the robbery conviction (count 6), resulting in an aggregate determinate term of 45 years in addition to the indeterminate term imposed by the trial court. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment reflecting this modification and shall forward a copy to the Department of Corrections and Rehabilitation.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.